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HOR CHIN SER & ANOR v. VILLA GENTING DEVELOPMENT SDN BHD & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
ZAMANI A RAHIM JCA
B ZALEHA YUSOF JCA
[CIVIL APPEAL NO: B-02(IM)-795-05-2015]
29 NOVEMBER 2016

C ***LAND LAW:*** *Transfer – Void instruments – Sale and transfer of properties – Developer company wound up – Liquidator for developer company could not conduct verification exercise to ascertain ownership of properties – Liquidator obtained vesting order for properties – Properties resold to new purchasers – Whether properties were assets of developer company – Whether sale and transfer of properties to new purchasers bona fide and valid – National Land Code, s. 340*

D ***COMPANY LAW:*** *Winding up – Liquidators – Developer company wound up – Liquidator for developer company could not conduct verification exercise to ascertain ownership of properties – Liquidator obtained vesting order and resold properties to new purchasers – Whether properties were assets of developer company – Whether liquidator right to put properties into his custody and control and in applying for* E *vesting order – Whether sale and transfer of properties to new purchasers bona fide and valid – Whether vesting order valid – Companies Act 1965, ss. 233 & 236*

The appellants claimed to be the purchasers and owners of 15 apartment ('the properties') units in a housing project ('Amber Court') of which the first F respondent was the developer. The first respondent was wound up and the appointed liquidator claimed that the register of owners for Amber Court could not be found and therefore, he could not conduct a verification exercise to ascertain ownership of the properties. The liquidator then applied and obtained a court order pursuant to s. 233 of the Companies Act 1965 ('the Act') to vest in the liquidator the properties ('the court order'). The G properties were resold by the liquidator and the second respondent became the registered owner of the properties except for two units which were bought and now registered under the names of the third and fourth respondents, respectively. The appellants commenced an application at the High Court, seeking orders that (i) the court order be set aside and/or varied in such H manner or to such extent that the properties be excluded; (ii) the sale and transfer of the properties by the liquidator be set aside; (iii) the liquidator to take immediate steps to effect a transfer and secure vacant possessions of the properties in favour of the appellants; and (iv) the appellants be given leave to commence legal proceedings against the first respondent and/or the I liquidator in respect of the sale and transfer of the properties and/or losses and damages suffered by the appellants. In dismissing the appellants' application, the Judicial Commissioner was of the view that, *inter alia*, the

properties were assets of the first respondent and therefore, the liquidator was right to put into his custody and control of the properties and applying for the vesting order. Hence, the present appeals. The issue highlighted for the court's adjudication was whether the properties belonged to the first respondent at the time when the liquidator applied for the vesting order.

Held (allowing appeals; setting aside decision of High Court)
Per Zaleha Yusof JCA delivering the judgment of the court:

(1) The land onto which the properties were constructed belonged to and were registered in the name of Samaworld (M) Sdn Bhd. There was no evidence that Samaworld (M) Sdn Bhd had also been wound up and that its affairs were in the hands of the liquidator. Therefore, there was no basis for the liquidator to apply for and obtain the court order. (para 23)

(2) In the agreement, the first respondent was called the vendor, and the right given to the vendor, as it appeared in the preamble, was to develop and sell the apartment land. In fact, the land title had an endorsement on it that the first respondent held the property as a trustee and all the 15 titles had the same endorsement. On trust property, sub-s. 233(2) of the Act only allows the liquidator to vest in it properties which were held by trustee on behalf of the company and not the other way round *ie,* the properties which the company held as trustee on behalf of others. (paras 13, 16 & 17)

(3) Section 236(2)(c) of the Act only allows the liquidator to sell the properties of the company. The liquidator was not permitted in law to sell or transfer the properties to new purchasers since the properties did not belong to the first respondent. The transfer to the second to fourth respondents was done through void instrument which attracted the application of s. 340 of the National Land Code ('NLC'). Therefore, the alleged '*bona fide*' of the second to fourth respondents, as immediate purchasers, was completely irrelevant and was not a bar for the setting aside of the sales and transfers made by the liquidator. The second to fourth respondents could not enjoy the benefit under the proviso to s. 340(3) of the NLC. The transfer of the title in the properties to the second to fourth respondents, being immediate purchasers, arose from a void instrument, and thus it automatically followed that they were liable to be set aside. (paras 26, 28, 34 & 39)

***Bahasa Malaysia** Headnotes*

Perayu-perayu mendakwa bahawa mereka adalah pembeli dan pemilik 15 unit apartment ('hartanah') satu projek perumahan ('Amber Court') yang pemajunya adalah responden pertama. Responden pertama digulung dan pelikuidasi yang dilantik menyatakan bahawa rekod pemilik-pemilik Amber Court tidak dijumpai dan akibatnya, dia tidak dapat melakukan pengesahan untuk mengenal pasti milikan hartanah tersebut. Pelikuidasi seterusnya memohon dan berjaya mendapat perintah mahkamah bawah s. 233 Akta

Syarikat 1965 ('Akta') untuk meletak hak hartanah tersebut pada pelikuidasi ('perintah mahkamah'). Hartanah tersebut dijual semula oleh pelikuidasi dan responden kedua menjadi pemilik berdaftar hartanah kecuali bagi dua unit yang dibeli dan kini setiap satu berdaftar atas nama responden ketiga dan keempat. Perayu-perayu memulakan permohonan di Mahkamah Tinggi, memohon perintah agar (i) perintah mahkamah diketepikan dan/atau diubah dalam sedemikian cara atau hingga hartanah tersebut dikecualikan; (ii) jualan dan pindah milik hartanah oleh pelikuidasi diketepikan; (iii) pelikuidasi hendaklah mengambil langkah segera untuk memindah milik dan memastikan milikan kosong hartanah bagi perayu-perayu; dan (iv) perayu-perayu dibenarkan memulakan prosiding terhadap responden pertama dan/atau pelikuidasi bagi jualan dan pindah milik hartanah dan/atau kerugian yang dialami oleh perayu-perayu. Menolak permohonan perayu-perayu, Pesuruhjaya Kehakiman berpendapat, antara lain, hartanah adalah aset responden pertama dan dengan itu, pelikuidasi bertindak betul dalam meletak hak hartanah dalam jagaan dan kawalannya dan memohon perintah letak hak. Maka timbul rayuan-rayuan ini. Isu yang diutarakan bagi pertimbangan mahkamah adalah sama ada hartanah tersebut milik responden pertama semasa pelikuidasi memohon perintah letak hak.

Diputuskan (membenarkan rayuan-rayuan; mengetepikan keputusan Mahkamah Tinggi)
Oleh Zaleha Yusof HMR menyampaikan penghakiman mahkamah:

(1) Tanah yang di atasnya terbina hartanah tersebut dimiliki dan berdaftar atas nama Samaworld (M) Sdn Bhd. Tiada keterangan bahawa Samaworld (M) Sdn Bhd juga digulung dan bahawa hal ehwalnya dalam tangan pelikuidasi. Oleh itu, tiada asas untuk pelikuidasi memohon dan mendapatkan perintah mahkamah.

(2) Dalam perjanjian, responden pertama dipanggil penjual, dan hak yang diberi pada penjual, seperti yang tertera dalam mukadimah, adalah memajukan dan menjual tanah apartment. Malah, pada hak milik tanah terlampir endorsmen bahawa responden pertama memegang hartanah sebagai pemegang amanah dan kesemua 15 hak milik melampirkan endorsmen yang sama. Bagi hartanah amanah, sub-s. 233(2) Akta hanya membenarkan pelikuidasi meletak hak padanya hartanah yang dipegang oleh pemegang amanah bagi pihak syarikat dan bukan sebaliknya iaitu hartanah yang syarikat pegang sebagai amanah bagi pihak lain.

(3) Seksyen 236(2) Akta hanya membenarkan pelikuidasi menjual hartanah syarikat. Pelikuidasi tidak dibenarkan, bawah undang-undang, menjual atau memindah milik hartanah kepada pembeli-pembeli baharu. Oleh kerana hartanah bukan milik responden pertama, pindah milik kepada responden kedua hingga keempat adalah melalui instrumen tidak sah dan membangkitkan pemakaian s. 340 Kanun Tanah Negara ('KTN'). Susulan itu, dakwaan 'suci hati' oleh responden kedua hingga keempat, sebagai pembeli langsung, tidak relevan sama sekali dan bukan

penghalang pengetepian jualan dan pindah milik yang dibuat oleh pelikuidasi. Responden kedua hingga keempat tidak boleh menikmati proviso s. 340(3) KTN. Pindahan hak milik hartanah kepada responden kedua hingga keempat, sebagai pembeli langsung, terhasil daripada instrumen tidak sah, kesemuanya secara automatik wajar diketepikan.

Case(s) referred to:
Angkutera Sdn Bhd v. Jurimba Sdn Bhd & Anor [2016] 8 CLJ 597 CA ***(foll)***
Jashin Scaffolding (M) Sdn Bhd v. Chew Ai Eng Sdn Bhd; OCBC Bank (Malaysia) Bhd (Applicant) [2004] 6 CLJ 497 HC ***(refd)***
Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***
Lee Teng Siong v. Lee Geok Thye Holdings Sdn Bhd [2003] 4 CLJ 834 HC ***(refd)***
Re Equity Funds of Australia (1976) 2 ACLR 238 ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(foll)***
Tan Ong Ban v. Teoh Kim Heng [2016] 3 CLJ 193 FC ***(refd)***
Tan Ying Hong v. Tan Sian San [2010] 2 CLJ 269 FC ***(refd)***
Young v. British Aeroplane [1944] KB 718 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 233(1), (2), 236(2)(c), 279
Courts of Judicature Act 1964, ss. 23, 24
National Land Code, s. 340(3)

Companies Act 1961 [NSW], s. 279

Other source(s) referred to:
J O'Donovan, Law of Company Liquidation, 3rd edn, p 246

For the appellants - Lau Kee Sern; M/s Shook Lin & Bok
For the 1st respondent - Harpal Singh Grewal, Sumathi, Sabrina Richards & Reny Rao; M/s Hakem Arabi & Assocs
For the 2nd, 3rd & 4th respondents - Jasvinjit Singh; M/s Jasvinjit Singh & Co

[Editor's note: Appeal from High Court, Shah Alam; Companies (Winding-up) No: MT3-28-199-2003 (overruled).]

Reported by Najib Tamby

JUDGMENT

Zaleha Yusof JCA:

[1] All these three appeals before us involve similar facts and issues. They are against the decision of the learned Judicial Commissioner (JC) of the High Court at Shah Alam who on 10 April 2015 dismissed the appellants' application for *inter alia* the following order:

(i) that the court order dated 9 December 2011 be set aside and/or varied in such manner or to such extent that all the 15 properties named in the applications (the properties) shall forthwith be excluded therefrom;

A (ii) the purported sale and transfer of the properties by the liquidator of the first respondent be set aside;

(iii) the liquidator of the first respondent do take immediate steps to effect a transfer and secure vacant possessions of the properties in favour of the appellants herein; and

B

(iv) the appellants herein be given leave to commence legal proceedings against the first respondent and/or the liquidator of the first respondent in respect of the purported sale and transfer of the properties and/or loss and damage suffered by the appellants herein.

C **Background Facts**

[2] The appellants claim that they are the purchasers and owners of a total of 15 apartment units in a housing project known as "Samaworld Parkview And Hillview Resort Apartment" in Pahang, which is later known as Amber Court. The first respondent (formerly known as Giant Bay Development Sdn

D Bhd) was the developer of the said housing project and Samaworld (M) Sdn Bhd (Samaworld) was the proprietor of the land involved in the project.

[3] Some of the appellants are original purchasers who had in 1991 entered into the sale and purchase agreements with the first respondent and

E the proprietor while some had bought the properties from other original purchasers with the consent of the first respondent.

[4] The first respondent was wound up on 14 July 2004 and the official receiver (OR) was appointed as the provisional liquidator. On 23 June 2005, one Sia Sien Hong was appointed as liquidator in place of the OR. Later, on

F 25 July 2006, one Dato' Abu Hanifah bin Noordin was appointed to replace Sia Siew Hong as liquidator. On 10 January 2013, one Gary Yong Yoon Shing (Gary) was appointed as joint liquidator. When Dato' Abu Hanifah resigned on 17 April 2013, Gary was given the authority to continue with the affairs and administration of the first respondent.

G **[5]** The liquidator claims that they could not find the register of owners for the Amber Court and that the complete set of documents were not kept. Hence, the liquidator had to conduct a verification exercise to ascertain ownership of the properties.

[6] Dato' Abu Hanifah had applied and obtained the said court order

H dated 9 December 2011 under s. 233 of the Companies Act 1965, to vest in the liquidator the properties.

[7] The properties had been resold between September and December 2012 by the liquidator and the second respondent is now the registered owner

I of the properties except for two units which were bought and are now registered under the names of the third and fourth respondents respectively. Hence the application at the Shah Alam High Court and now the appeals before us.

Decision Of The High Court

[8] At the High Court, the issue whether the vesting order and the transfer to the new owners were valid had been argued and discussed. The learned JC was of the view that there was no contravention to s. 233 of the Companies Act 1965 as the properties were assets of the first respondent based on the sale and purchase agreement and the fact that the strata titles were issued under its name. Therefore the liquidator, in her view, was right in taking steps to put into his custody and control of the properties and applying for the vesting order. She was satisfied that the verification exercise undertaken by the liquidator was conducted properly and according to the law without malice. Her Ladyship felt that the liquidator had acted reasonably and that more than sufficient notices, letters and advertisements had been sent out regarding the verification exercise. Her ladyship was of the view that since there was no response from the appellants and/or their financier with the complete set of documents to prove ownership, the liquidator was not at fault in obtaining the said vesting order and in selling the properties.

[9] The learned JC was also of the opinion that the appellants had failed to take any step to protect their rights like entering a caveat and had for many years sat or slept on their rights. They therefore cannot now blame the liquidator for obtaining the vesting order and in selling the properties to the second, third and fourth respondents.

Our Decision

[10] Parties had submitted on various issues but it is our considered opinion that the main issue that this court needs to decide is whether the properties were the properties of the first respondent at the time when the liquidator applied for the vesting order. As shown at p. 12 of the core bundle vol. 1, the notice of motion culminated in the making of the vesting order and subsequently the sale of the properties to the second to fourth respondents was clearly based on s. 233 and sub-s. 236(2) of the Companies Act 1965. Those sections, *inter ali*a read as follows:

> 233. Custody and vesting company's property.
>
> (1) Where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.
>
> (2) The Court may, on the application of the liquidator, by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator and thereupon the property to which the order relates shall vest accordingly and the liquidator may, after giving

A such indemnity, if any, as the Court directs, bring or defend any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.

236. Powers of liquidator.

B (2) The liquidator may:

(c) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;

C (3) The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise of any of those powers.

D **[11]** Subsection 233(1) allows the liquidator to take into his custody or under his control all the property to which the company in winding up is or appears to be entitled. Whereas sub-s. 233(2) empowers the court to vest in the liquidator all or any part of the property belonging to the company. Hence the crux of the matter is, as stated earlier, whether the properties belonged to the first respondent then.

E **[12]** The relevant parts of the judgment of the learned JC on this issue are as follows:

[30] Pencelah A telah cuba mempertikaikan hak ketuanpunyaan Responden ke atas 173 unit yang tidak dijual termasuk unit tersebut dengan pengataan bahawa Responden adalah cuma syarikat pemaju yang F telah membangunkan projek dan bukanlah tuanpunya berdaftar hartanah-hartanah di mana projek itu dibangunkan. Adalah menjadi dapatan Mahkamah ini, pengataan Pencelah adalah satu pengataan yang khilaf dan silap kefahaman. Responden sememangnya adalah tuanpunya benefisial/berkepentingan bagi unit tersebut. Ini jelas berdasarkan kepada G perjanjian jualbeli yang dimasuki oleh pembeli asal (Wong) dan Giant Bay Development Sdn Bhd. Responden dahulunya dikenali sebagai Giant Bay Development Sdn Bhd yang telah disandarkan oleh Pencelah A. Preamble perjanjian bertarikh 12.8.1991 jelas menunjukkan hak Responden seperti berikut:

H PREAMBLE

WHEREAS the Proprietor is the registered owner of all that piece of land held under Geran No. 3620 for Lot No. 10330 (formerly known as H.S.(D) No. 2022 for Lot P.T. No. 2057/45) in the Mukim and District of Bentung, State of Pahang Darul Makmur (hereinafter called "the said Land") in area measuring I approximately 673,462 square metres;

AND WHEREAS GIANT BAY (MALAYSIA) SDN BHD (formerly known as Techlines Corporation Sdn. Bhd.), a company incorporated in Malaysia and having its registered office at Wisma Sama, Lot 26 Jalan 223/51A, 46100 Petaling Jaya, Selangor Darul Ehsan (hereinafter called "the company") is the **beneficial owner of the Apartment Land by virtue of or under the Partition Agreement dated the 18th day of November 1986**;

AND WHEREAS the said Land is presently charged by the Proprietor to Citibank N.A., a company incorporated under the laws of the State of New York, United States of America, and having a place of business at Citibank Building, No. 28 Medan Pasar, 50050 Kuala Lumpur (hereinafter called "the Lender") as security for loans or banking facilities granted to the Company;

AND WHEREAS the Vendor has, at its own cost and expense, obtained the approval of building plans (hereinafter called "the Building Plan") from the Appropriate Authority (a copy of the Floor Plan, Storey Plan and Site Plan as certified by the Vendor's Architect of which are annexed hereto as The Second Schedule);

AND WHEREAS the Vendor is developing the portion of the said Land in area measuring approximately 46,583 square metres which is provisionally known as as Plot RA1, (hereinafter called "the Apartment Land") into a housing development known as **SAMAWORLD PARKVIEW AND HILL VIEW RESORT APARTMENTS** (PANGSAPURI PERANGINAN DUNIA SAMA) complete thereon with the common facilities as in the Third Schedule hereto (Advertisement and Sale Permit No. 4772/1209/91(12);

AND WHEREAS the Proprietor and the Company have granted the Vendor the absolute right to develop and sell the Apartment Land;

AND WHEREAS the Proprietor and the Company hereby agree to the sale of the Apartment Land for the purpose if this Agreement;... (Penekanan oleh Mahkamah ini).

[31] Vendor di dalam perjanjian bertarikh 12 August 1991 adalah Giant Bay Development Sdn Bhd seperti yang dinyatakan di dalam Recital perjanjian.

AN AGREEMENT made the day and year stated the Part 1 of The First Schedule here to BETWEEN GIANT BAY DEVELOPMENT SDN BHD, a company incorporated in Malaysia and duly licenced under the Housing Developers (Control and Licensing) Act 1966 (Licence No. 4772/12-95/1094) with, its registered office at Wisma Sama, Lot 26 Jalan 223/51A, Petaling Jaya, Selangor Darul Ehsan (hereinafter called "the vendor") ...

[32] Kedudukan responden ke atas projek yang membangunkan unit-unit kondominium termasuk unit tersebut adalah lebih jelas dan nyata apabila hakmilik-hakmilik strata telah dikeluarkan oleh Majlis Perbandaran

A Bentong pada tahun 2005 di mana semua unit-unit yang dibangunkan di dalam projek tersebut telah didaftarkan ke atas nama responden seperti yang dicatatkan di dalam rekod hakmilik.

REKOD KEPUNYAAN URUSNIAGA DAN PERKARA-PERKRA LAIN YANG MELIBATKAN HAKMILIK

B VILLA GENTING DEVELOPMENT SDN. BHD.

Sebagai Pemegang Amanah

LOT 12.03, WISMA STEPHENS

JALAN RAJA CHULAN

C 50200 WILAYAH PERSEKUTUAN K. LUMPUR

[34] Maka, persoalan isu unit tersebut atau 173 unit tersebut bukan kepunyaan atau bukannya aset Responden adalah tidak timbul langsung atau tidak menjadi relevan. Justeru, apabila unit tersebut dan 172 unit lagi sememangnya aset-aset Responden semasa ia digulungkan maka ia
D pastinya menarik pemakaian peruntukan seksyen Seksyen 233(1) Akta. Di dalam hal ini, Pelikuidasi adalah berhak untuk mengambil kawalan dan jagaan unit tersebut.

[13] The bold words and underlines in the agreement quoted by the learned JC were made by Her Ladyship to emphasise that the properties indeed
E belonged to the first respondent. However, with due respect, Giant Bay (Malaysia) Sdn Bhd mentioned in the preamble as "the beneficial owner of the apartment land" was not the first respondent. The first respondent was Giant Bay Development Sdn Bhd, a different entity. In the agreement, the first respondent was called "the vendor". The right given to the vendor as
F appears on the preamble was the right "to develop and sell the apartment land".

[14] Therefore in our view, the learned JC had clearly erred when she concluded that the first respondent was the beneficial owner of the properties and that the properties were assets of the first respondent based on those
G wordings of the preamble to the agreement.

[15] In fact we have perused the records of appeal and we find that the fact that the first respondent was not and was never the owner of the properties but merely a developer who was given a right by the land owner ie, Samaworld, to develop the lands was admitted by the first respondent in the
H first respondent's own affidavit affirmed on 18 October 2013 as found in para. 10 at p. 105 to be read with para. 11 at p. 112 of rekod rayuan bahagian B and C for appeal No. B-02(IM)-796-05-2015 and the affidavit affirmed on 21 March 2010 as shown in para. 14 at p. 154 to be read with para. 14 at p. 121 rekod rayuan bahagian B for Appeal No. B-02(IM)-797-05-2015.

I **[16]** That is not the only evidence that shows that the first respondent was not the owner of the properties. It had been pointed out to us that even the land title had an endorsement on it that the first respondent held the property

as trustee: "Villa Genting Development Sdn Bhd sebagai pemegang amanah". This can clearly be seen for eg, at tab 38, Jilid 3 of the core bundle, p. 974. It is not disputed that all the 15 titles have the same endorsement. Learned counsel for the first respondent argued that the first respondent did not hold the land as trustee for the purchaser but for the proprietor, Samaworld. In our view, whether the first respondent held the land as a trustee for the purchaser or as a trustee for the proprietor, the fact remains, it was not the real owner of the land.

[17] On trust property, sub s. 233(2) of the Companies Act only allows the liquidator to vest in it properties which were held by trustee on behalf of the company and not the other way round ie, the properties which the company held as trustee on behalf of others.

[18] Section 233 of the Companies Act had been discussed in *Jashin Scaffolding (M) Sdn Bhd v. Chew Ai Eng Sdn Bhd; OCBC Bank (Malaysia) Bhd (Applicant)* [2004] 6 CLJ 497 where it was found and decided:

> The Liquidator submission seem to imply that since the liquidation of the Respondent Company, the Liquidator is vested with the custody and control of all property of the company irrespective of whether it is encumbered or given as security to the secured Creditor by virtue of section 233(1) of the Companies Act 1965 and allegedly, the proposed creation of a charge will be an usurpation of the Liquidator's powers. The Liquidator further submitted that the issue of whether to create the proposed charge should be left to the Liquidator's discretion.
>
> Again, the Court cannot accept this submission. In the present case, **the Liquidator does not have a better right than the Respondent Company in its liquidation**. The Respondent Company does not have a right to demand from the Applicant to hand over the Said Property to it until fully redeemed. Therefore, *in liquidation the Liquidator is not entitled to deal with the said property. The Respondent has absolutely assigned the said property to the Applicant and has contracted to transfer the said property and thereafter, to create charge in favour of the Applicant. The Liquidator likewise should be bound by the contractual terms earlier agreed to by the Respondent*. In this respect, the Court refers to sections 233(1) and 277(5) of the Companies Act 1965 which provide as follows:
>
> > S. 233(1) Where a winding up order has been made or a provisional Liquidator has been appointed, the Liquidator or provisional Liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.
> >
> > S. 277(5) The Court may require any contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer to the Liquidator or provisional Liquidator forthwith or within such time as the Court directs any money, property, books and papers in his hands to which the company is *prima facie* entitled.

Section 233(1) clearly stipulate that the Liquidator in dealing with company in liquidation *shall only take into his custody or control all property and things in action which the company is or appears to be entitled and in the case of section 277(5), only those property to which the company is prima facie entitled*. Again, in this respect, the Court refers to the decision of the Court of Appeal in *K. Balasubramaniam* case *(supra)* where Justice Mohd Saari Jusoh JCA, held (at page 376):

> The question which arises is, is the Liquidator *prima facie* entitled to the movable asset in the present case pursuant to s. 233(1) and s. 277(5)?. In light of *Director of Custom F.T.*'s case *(supra)* and *Mahadevan*'s case *(supra)*, **our view is that the company is not *prima facie* entitled to the movable asset**.

It is common ground that the debenture in the present case was registered under s. 108 of the Companies Act 1965, meaning that the 1st Respondent as debenture holder was a chargee of equitable charge. Assuming KCL was not in liquidation, it is incumbent upon KCL to redeem it before R&M could be compelled to hand over the movable asset to KCL. Thus, turning to the present case, **why should the Liquidator's right be greater than that of KCL**? In light of our finding in para 13 herein, R&M could not be compelled to hand over the movable asset to the Liquidator. KCL is only entitled to equity of redemption and it follows, therefore, that the Liquidator is only entitled to exercise his right of redemption. (emphasis added)

[19] This court in a recent case of *Angkutera Sdn Bhd v. Jurimba Sdn Bhd & Anor* [2016] 8 CLJ 597; [2016] 5 MLJ 242 had also discussed the provision of s. 233 of the Companies Act. In that case, the appellant entered into an agreement with the land owner, Fenghua and the developer, the second respondent, for the purchase of the basement and rooftop of a building known as Kompleks Aik Aik. The problem arose when the second respondent went into liquidation and the liquidator of the second respondent encountered difficulty in locating the documents pertaining to the assets of the second respondent. The liquidator then conducted a proof of ownership exercise and verification exercise to ascertain this fact and later on, obtained a vesting order with regard to the Cineplex, the subject matter of the said case. The appellant claimed for the ownership of the Cineplex as it was located on the rooftop but the claim was rejected by the liquidator. The Cineplex was later sold to the first respondent by the liquidator. Being dissatisfied with the action taken by the liquidator, the appellant filed summons-in-chambers to intervene in the winding-up proceedings of the second respondent and to vary the vesting order. The trial court dismissed the application, hence the appeal to the Court of Appeal.

[20] At p. 608 (CLJ); p. 253 (MLJ) of the decision it was stated:

> We had considered very carefully the submissions made by the parties. We agree with learned counsel for the appellants that s. 233(2) of Act 125 stipulates that what shall vest in the liquidator are only properties legally belonging to the company in liquidation. It must not be forgotten that the

owner or proprietor of the land is Fenghua. The preamble of the agreement shows that Fenghua had granted Aik Aik Holdings the right to develop the land as a shopping and office complex and had agreed to the sale of the parcels units in the complex. Even the learned JC in her ground of judgment had earlier found that Fenghua had entered into a joint venture agreement with Aik Aik Holdings for the purpose of developing the land.

[21] This court in *Angkutera*, *supra*, had held that the developer's interest in the land was purely monetary and it was not the owner of the land but Fenghua. Hence, the vesting order was wrong as the liquidator could only be vested with the property that belongs to the second respondent and the Cineplex did not belong to the second respondent, the company in liquidation.

[22] This court had allowed the appellant's appeal in *Angkutera*, *supra*, and set aside the order of the High Court. The respondents filed an application for leave to appeal to the Federal Court and the Federal Court had recently dismissed the leave application ie, on 24 October 2016.

[23] Similarly in this case we find that the first respondent was merely the developer of the housing development, Amber Court, where the properties are situated. The land onto which the properties were constructed belonged to and registered in the name of another company called Samaworld (Malaysia) Sdn Bhd. There is no evidence that the proprietor ie, Samaworld had also been wound up and that its affairs were in the hands of the liquidator. Arising from that we opine there was therefore no basis for the liquidator to apply for and obtain the court order of 9 December 2011.

[24] We opine, following the English Court of Appeal in *Young v. British Aeroplane* [1944] KB 718, we are bound by the decision of this court in *Angkutera*, *supra*; as far as s. 233 of the Companies Act is concerned as there is no cogent reasons for us to depart from it especially when the Federal Court in *Angkutera*, *supra*, had refused the application for leave to appeal. Hence, we also opine that the first respondent, being the developer of the properties, its interest in the properties was purely monetary. The liquidator was therefore wrong in applying and obtaining the vesting order to vest the properties which the first respondent did not own.

[25] As mentioned in the early part of this judgment, the properties are now registered in the names of the second, third and fourth respondents separately after the said respondents bought the properties from the liquidator of the first respondent. Learned counsel for the second, third and fourth respondents submitted that there is nothing in the National Land Code (NLC) which prohibits the transfer which was made by the proper registered proprietor ie, the first respondent to the said respondents. He argued that sub-s. 236(2)(c) of the Companies Act entitles the liquidator to sell and transfer the properties without the need for the vesting order. Even if the

vesting order was liable to be set aside for contravention of sub-s. 233(1), it cannot now be set aside as this would be an injustice to the second, third and fourth respondents who purchased the properties pursuant to a tender exercise and paid the full purchase price. Put in another way, an order of court cannot be set aside if third party rights will be prejudiced: *Lee Teng Siong v. Lee Geok Thye Holdings Sdn Bhd* [2003] 4 CLJ 834; [2004] 5 MLJ 13 at p. 25, para. 27. Furthermore, here, the liquidator has paid out the proceeds from the sale to the first respondent's creditors. There is no way for the second, third and fourth respondents to get back their monies - to be returned to their *status quo*.

[26] As we have discussed earlier, the first respondent was not the proper registered proprietor of the properties. Section 236(2)(c) of the Companies Act only allows the liquidator to sell the properties of the company. The word "belonging" as appears in s. 233 clearly denotes ownership. See: *Black's Law Dictionary Deluxe*, 9th edn. The properties herein did not and do not belong to the first respondent. Hence, it is quite irresistible for this court to conclude that the transfer was done through void instrument which attracts the application of s. 340 of the NLC.

[27] In this regard, we agree with learned counsel for the appellants' submission. The power of the court to deal with this issue stems from s. 279 of the Companies Act. Section 279 of the Companies Act 1965 clearly states that the winding-up court may "reverse or modify the act and/or decision of" the liquidator "and make such order as it thinks just". In *Law of Company Liquidation* by J O'Donovan, 3rd edn, at p. 246 it is stated:

> The validity of acts done by a liquidator may be challenged on a variety of grounds: it may be established that the basis on which his appointment rests is in some respect defective; or that he has exceeded his statutory powers as liquidator; or that, although acting within the scope of his powers, he has failed to obtain the necessary approval or sanction for the exercise of that power.

We also observe, in *Re Equity Funds of Australia* (1976) 2 ACLR 238, when considering s. 279 of the New South Wales Companies Act 1961, which is in *pari materia* with our s. 279 of the Companies Act, Bowen CJ said:

> The powers given to the court are to consider whether the act or decision of the liquidator was right, so that it should be confirmed, or wrong, so that it should be reversed, or partly right and partly wrong, so that it should be modified. To do this the court must have regard to the circumstances which were before the liquidator at the time of his act or decision and not to circumstances subsequently arising, subject to this qualification that in the last part of the section the court is empowered to make such order as it thinks just. This is an ancillary power to make consequential orders. I think in exercising that the power and moulding the form of order to suit the circumstances of the case, the court would be entitled to pay regard to facts and events occurring after the liquidator's decision and up to the time it was making its consequential order.

[28] As we have found earlier, the circumstances before the liquidator at the time the vesting order was applied for, was so clear, that the first respondent was not the owner of the properties. We agree with learned counsel for the appellants that the learned JC had erred, for it is trite law now that the alleged "*bona fide*" of the second to fourth respondents, as immediate purchasers, is completely irrelevant and is not a bar for the setting aside of the sales and transfers made by the liquidator.

[29] The Federal Court in *Tan Ying Hong v. Tan Sian San* [2010] 2 CLJ 269; [2010] 2 MLJ 1 had made it very clear that an immediate purchaser cannot avail itself to the proviso to s. 340(3) of the National Lade Code. At p. 61 (CLJ); p. 22 (MLJ) of the case report the court said:

> We must stress that, the fact that third respondent acquired the interest in question in good faith for value is not in issue, because once we are satisfied that the charges arose from void instruments, it automatically follows that they are liable to be set aside …

[30] In another Federal Court case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] MLJ 7681, the above principle enunciated in *Tan Ying Hong*, *supra*, had been lucidly adopted where at para. 38 (CLJ) para. 43 (MLJ), Jeffrey Tan FCJ said:

> In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were *bona fide* purchasers. But unfortunately, both the trial court and the Court of Appeal had failed to inquire whether the fifth and sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from *Tan Ying Hong* that *bona fides* of an immediate purchaser is not a shield to defeasibility. The defeasible title of a *bona fide* immediate purchaser is still liable to be set aside. The defeasible title of a *bona fide* immediate purchaser only becomes infeasible when it is subsequently passed to a *bona fide* subsequent purchaser. That the fifth and sixth respondents were *bona fide* purchasers could not by facts alone gives a shield of indefeasibility ...

[31] The Federal Court was, in the recent decision in *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944, asked to decide on the following question:

> whether the title of *bona fide* registered owner without notice under the NLC can be defeated by a non-registered interest of an assignee/lender under an earlier sale and purchase agreement in respect of the same piece of land with other purchasers other than the 1st Applicant.

[32] The Federal Court had answered the said question in the affirmative. At para. 61, the Federal Court said:

> 61. The question for determination before us brings into focus the statutory rights of a registered land proprietor/owner as conferred by the statutory provisions under section 340 of the NLC as against an equitable

A right of an unregistered interest of an assignee or lender under an earlier sale and purchase agreement and deed of assignment in respect of the same piece of land.

[33] After reviewing several authorities, the Federal Court said at paras. 70 and 87 as follows:

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> 70. In the present case, as we have shown earlier the undisputed facts of the case clearly show that the Sale and Purchase Agreements as well as the Deeds of Assignment with the earlier Purchasers are valid and enforceable; and the subsequent Sale and Purchase Agreements with the new Purchasers (including the appellant) are *void ab initio* and no effect. It follows that the related transfer forms (Form 14A) must also be void and ineffective to create a registrable transfer. The agreed and undisputed facts of the case support the finding that there is sufficient evidence to show that the said Form 14A was in fact a void instrument.
>
> …
>
> 87. Accordingly, for reasons already given we would answer the question posed to us in the affirmative: "that the title of registered proprietor who was a *bona fide* immediate purchaser without notice under the National Land Code (Act of 1965) can be defeated by the non-registered valid equitable interest of an absolute assignee under an earlier sale and purchase agreement in respect of the same piece of land with another purchaser who was not an appellant."

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[34] We therefore agree with learned counsel for the appellant that likewise, in the present case, the second to fourth respondents clearly cannot enjoy the benefit under the proviso to s. 340(3) of the National Land Code. Once the court is satisfied that the transfer of the title in the properties to the second, third and fourth respondents, being immediate purchasers, arose from a void instrument, to borrow the words of Arifin Zakaria CJ (Malaya) (as His Lordship than was) in *Tan Ying Hong*, *supra*, "it automatically follows that they are liable to be set aside".

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[35] Although the case of *Samuel Naik*, *supra*, did not involve liquidator, the principle on s. 340 in our opinion, still applies.

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[36] In a recent decision by the Federal Court in *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193 a similar position had been taken by the apex court. The Chief Justice Arifin Zakaria had at p. 205 said as follows:

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> [34] According to this principle, when a purchaser of a property has performed his or her contractual obligation **upon the full settlement of the purchase price** besides executing all the formal documents to effect the registration of ownership, equity accords him or her with all the rights and privileges of a legal owner over the property. **The purchaser thus enjoys the benefit of being the owner of the acquired property even though he or she has yet to become its registered owner**.

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[35] This is clearly demonstrated by the case of *J Raju M Kerpaya @ Jayaraman M Kerpaya (supra)*, where the Supreme Court held that:

> … the vendor of the land is only regarded as having divested himself of the beneficial interest in his land and vested it on the purchaser at the time when the purchase money had been paid in full.

(See also *M&J Frozen Food Sdn Bhd & Anor (supra)* and *Peninsular Land Development Sdn Bhd v. K Ahmad* [1969] 1 LNS 124; [1970] 1 MLJ 149).

[36] The principle of beneficial ownership differentiate between the rights of a purchaser of a property who has fully settled the purchase price with one who has not. **This principle clothes a purchaser who has settled the full purchase price with a distinct privilege equivalent to a legal owner, although he or she has yet to be registered as the proprietor of the property**.

[37] Under this principle of beneficial ownership, the vendor becomes a bare trustee for the purchaser in respect of the transacted property, while the purchaser assumes the position of beneficial owner having right *in rem* over the property. The purchaser is commonly accepted as having a beneficial interest in the land on the execution of the contract and upon which specific performance may be granted by the court. This beneficial interest is also sufficient to entitle the purchaser to enter a caveat under the NLC. (emphasis added)

[37] In fact, it cannot be disputed that as stated earlier, before the *ex parte* order was applied for or obtained by the liquidator, the strata titles of the properties issued on or about 12 May 2005 clearly show that the first respondent was merely a trustee ("pemegang amanah").

[38] Hence, we agree with learned counsel for the appellants that these titles themselves show that the first respondent was merely a "bare trustee". It matters not, whether the first respondent was a trustee for the purchasers or for the proprietor. What is important, his status remained as a trustee. Consequently, the liquidator was simply not entitled to apply for and obtain the *ex parte* order under s. 233 of the Companies Act 1965 or to sell the properties to the second to fourth respondents under s. 236 of the Companies Act 1965.

[39] Learned counsel for the appellants had pointed out to us the proof of payment of purchase price as shown in annex A. Indeed, when the purchase price had been paid in full, the position of the liquidator of the first respondent as a bare trustee, that is, a person without beneficial interest in the property cannot be challenged. The liquidator was therefore not permitted in law to sell or transfer the properties to the new purchasers including the second to fourth respondents. See *Samuel Naik*, *supra*.

[40] The learned JC had put the blame on the appellants and/or their financier for their alleged failure to lodge a private caveat on the properties. However, as decided by the Federal Court in *Samuel Naik*, *supra*, the fact that there was failure on the part of the appellants to lodge a caveat does not defeat their rights, titles and interests in respect of the properties.

[41] Learned counsel for the second to fourth respondents had questioned the capacity of a winding-up court to deal with the issue of void transfer. We however, do not see any reason why a winding-up court cannot deal with this issue of void transfer by the liquidator to the second, third and fourth respondents; especially when it flows from the liquidator's action in administrating the so-called estate of the winding up of the first respondent. Furthermore, ss. 23 and 24 of the Courts of Judicature Act 1964 empower the High Court to deal in such matter.

Conclusion

[42] For these reasons, we unanimously allow these appeals with cost. The decisions of the High Court is therefore set aside.